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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. RICHARD LYLE LEWIS, SR., Defendant and Respondent.	E064598 (Super.Ct.No. RIF137850) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Michael A. Hestrin, District Attorney, and Emily R. Hanks, Deputy District Attorney, for Plaintiff and Appellant.

Robert V. Vallandigham, Jr., under appointment by the Court of Appeal, for Defendant and Respondent.

I

INTRODUCTION

The People appeal from the trial court's order granting defendant Richard Lyle

Lewis, Sr.'s application for reduction of his second degree burglary conviction (Pen. Code, § 459)[1] to misdemeanor shoplifting (§ 459.5) under Proposition 47, the Safe Neighborhoods and Schools Act. (§§ 1170.18, 459, 459.5.) It is undisputed defendant committed the burglary by entering a bank with the intent to cash a forged $700 check.

The People request this court to reverse the trial court order granting defendant's felony reduction application on the ground defendant failed to meet his burden of proving eligibility for reduction of his burglary conviction to misdemeanor shoplifting. The People also argue defendant's burglary conviction does not qualify for reduction because a bank is not a "commercial establishment" and identity theft is not larceny under section 459.5.

We conclude the People forfeited their objection that defendant failed to meet his burden of proving eligibility by not raising it in the trial court. We also conclude a bank is a commercial establishment under Proposition 47. In addition, the People forfeited their identity theft contention. Even if not forfeited, the contention is not supported by the record. We therefore affirm the trial court order granting defendant's felony reduction application.

II

FACTUAL AND PROCEDURAL BACKGROUND

The Riverside County District Attorney filed a felony complaint against defendant alleging in count 1 that on May 10, 2006, defendant violated section 459 (burglary) by

[1] Unless otherwise noted, all statutory references are to the Penal Code.

willfully and unlawfully entering a building located in Norco, with intent to commit theft and a felony. The complaint further alleged in count 2 that on May 10, 2006, defendant violated section 470, subdivision (d), (forgery) by willfully and unlawfully falsely making, altering, forging, and counterfeiting a check, and did utter, publish, pass, and attempt and offer to pass the check as true and genuine, knowing it to be false, altered, forged, and counterfeited, with intent to defraud. The complaint also alleged defendant had 10 prison priors (§ 667.5, subd. (b)).

On October 17, 2007, defendant signed a felony plea form and orally pled guilty to burglary, as alleged in count 1, and admitted one prison prior. The felony plea form does not include any factual statement of the burglary crime. In accordance with the plea agreement, the trial court sentenced defendant to a three-year prison term, and dismissed count 2 and all but one prison prior.

On April 15, 2015, defendant filed a form application for reduction of his felony conviction to a misdemeanor under Proposition 47 (application). Defendant alleged in his application that he was convicted of section 459, second degree burglary (shoplifting) and believes the value of the check or property does not exceed $950. Defendant further stated he had completed his sentence on the felony conviction. Defense counsel signed the form application under penalty of perjury. No evidence was provided in support of the application.

The People filed a form response to defendant's application. The People did not check the boxes alleging that defendant was not entitled to the relief requested or that the

burglary was not a qualifying felony. The People only checked the box requesting a hearing to determine the value of the property at issue. After filing their form response, the People filed points and authorities in opposition to defendant's application (opposition brief).

Neither party provided any evidence establishing the facts of the crime. However, the People stated in their opposition brief that defendant cashed a money order or check[2] at a Bank of America branch. The check belonged to the victim, Joseph Jenkins, who had deposited it into a mailbox. Defendant somehow acquired the check and had it altered to be made payable to himself. The People described in their opposition brief defendant's criminal act as follows: "Defendant entered a bank, a financial institution, for the purpose of cashing a forged check." The People argued defendant entered the bank to commit a felony other than larceny. The People's sole argument in opposition to defendant's application was that defendant was ineligible for reduction of his burglary conviction to misdemeanor shoplifting because he committed second degree burglary of a bank, which is not a commercial establishment.

The trial court ruled on defendant's application without conducting a hearing. The trial court granted defendant's application and ordered defendant's burglary conviction reduced to misdemeanor shoplifting (§ 459.5). The court's order granting defendant's application states the following finding: "Def. enters bank—cashes forged 700 check.

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[2] Although we recognize money orders and checks differ in nature, and it is unclear as to whether the document defendant altered was a money order or check, we will refer to it as a check, for ease of reference.

Court notes People's objection that bank is not a commercial establishment and over[]rules."

III

FORFEITURE OF BURDEN OF PROOF OBJECTION

The People contend defendant failed to establish that his burglary offense was eligible for misdemeanor redesignation under Proposition 47. However, the People concede in their appellant's opening brief that defendant committed the burglary by entering the bank with intent to cash a forged $700 check. These facts, which support eligibility, are undisputed on appeal.

A. Proposition 47

"'On November 4, 2014, the voters enacted Proposition 47, "the Safe Neighborhoods and Schools Act" (hereafter Proposition 47), which went into effect the next day. [Citation.]' [Citation.] Section 1170.18 'was enacted as part of Proposition 47.' [Citation.] Section 1170.18 provides a mechanism by which a person currently serving a felony sentence for an offense that is now a misdemeanor, may petition for a recall of that sentence and request resentencing in accordance with the offense statutes as added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in subdivision (a) of section 1170.18, shall have his or her sentence recalled and be 'resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to

public safety.' [Citation.]" (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 649, fn. 2 (*T.W.*).)

"Section 1170.18, subdivision (a) provides: 'A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing . . . .' " (*T.W., supra,* 236 Cal.App.4th at p. 651, italics omitted.)

"[S]ection 1170.18 clearly and unambiguously states, 'A person currently serving a sentence for a conviction, whether by trial or plea' of eligible felonies may petition for resentencing to a misdemeanor. [Citation.]" (*T.W., supra,* 236 Cal.App.4th at p. 652, italics omitted.) "After a petitioner is found to be eligible, the trial court must grant the petition for reduction of sentence unless the court finds in its discretion that the petitioner poses an unreasonable risk of committing a very serious crime. [Citation.]" (*Ibid.*)

Similarly, a defendant who has completed a sentence for a crime may file an application under Proposition 47 to reduce his or her felony conviction to a misdemeanor. Section 1170.18, subdivision (f), states: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as

misdemeanors." Subdivision (g) of section 1170.18 provides: "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor."

Among the crimes reduced to misdemeanors by Proposition 47 "are certain second degree burglaries where the defendant enters a commercial establishment with the intent to [commit larceny]. Such offense is now characterized as shoplifting as defined in new section 459.5." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 (*Sherow*).) Section 459.5, subdivision (a), provides: "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary." "Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting." (§ 459.5, subd. (b).)

In the instant case, when defendant requested his burglary conviction be reduced to misdemeanor shoplifting under Proposition 47, he had already completed his sentence on the burglary conviction. Therefore his request was an application for redesignation under subdivisions (f) and (g) of section 1170.18.

B. Discussion

The People argue defendant did not meet his burden of proof because he failed to present any evidence of the underlying facts of the burglary. A defendant seeking

resentencing or reclassification of a felony as a misdemeanor under Proposition 47 bears the burden of demonstrating that his underlying offense is eligible for reduction under section 1170.18. (*Sherow, supra,* 239 Cal.App.4th at p. 879.) Defendant was therefore required to establish that his burglary offense qualified as misdemeanor shoplifting (§ 459.5).

Although neither defendant nor the People presented any evidence of the underlying facts of the burglary, the record shows that the People conceded in their opposition brief that "Defendant entered a bank, a financial institution, for the purpose of cashing a forged check." The trial court found eligibility based on the finding: "Def. enters bank—cashes forged 700 check. Court notes People's objection that bank is not a commercial establishment and over[]rules." It is unclear from the record as to the basis of the trial court's finding the check was $700. However, on appeal, both parties concede this fact.

Furthermore, defendant stated in his application that the property at issue did not exceed $950 and the People did not disagree. In the People's form response to defendant's application, the People initially requested a hearing for determination of the value of the property but then filed an opposition brief which did not argue that the property exceeded $950 or that defendant had not met his burden of proof. Instead, the People solely argued in their opposition brief that the burglary did not qualify as misdemeanor shoplifting because the crime was committed at a bank, which the People argued was not a "commercial establishment" under section 459.5.

"It is settled that points not raised in the trial court will not be considered on appeal. [Citations.] This rule precludes a party from asserting on appeal claims to relief not asserted in the trial court." (*Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422 (*Dimmick*); see *People v. Gillard* (1997) 57 Cal.App.4th 136, 160 (*Gillard*).) The People abandoned or forfeited any objection to defendant not establishing that the property at issue was less than $950 by not asserting it in the trial court. The People likewise forfeited their objection raised for the first time on appeal that defendant failed to present evidence establishing shoplifting. The only objection the People raised in their opposition brief was that the bank was not a commercial establishment under section 459.5. As discussed below, we reject that argument as well.

The trial court therefore appropriately granted defendant's application based on the undisputed facts that defendant entered a bank with the intent to cash a $700 forged check. Entering a bank with an intent to cash a forged check is entry with an intent to commit theft by false pretenses and thus constitutes entry with "intent to commit larceny" within the meaning of section 459.5, if the value of the check was $950 or less. (See § 484, subd. (a); *People v. Williams* (2013) 57 Cal.4th 776, 787 [elements of theft by false pretenses].)

IV

A BANK IS A COMMERCIAL ESTABLISHMENT

The People argue defendant could not be found guilty of shoplifting because section 459.5 only applies to a "commercial establishment" (§ 459.5, subd. (a)), and a

bank is not a commercial establishment within the meaning of section 459.5 and Proposition 47. We disagree.

Proposition 47 added section 459.5 to the Penal Code. This new statute, which adds the crime of "shoplifting," provides in relevant part: "Notwithstanding Section 459 [burglary], shoplifting is defined as entering a *commercial establishment* with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a), italics added.)

The trial court concluded that a bank is a "commercial establishment" within the meaning of section 459.5. We review de novo the trial court's interpretation of this provision. (*People v. Rizo* (2000) 22 Cal.4th 681, 685.)

Neither Proposition 47 nor the Penal Code defines commercial establishment. We therefore look to its meaning in ordinary usage. (See *Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 91.) If language in an initiative is ambiguous, we may consider extrinsic materials, such as ballot summaries, to aid in determining the voters' intent. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.)

In our recent decision, *People v. Abarca* (Aug. 12, 2016, E063687) __ Cal.App.5th __ [2016 Cal.App. Lexis 675, p. 9] (*Abarca*), we considered the meaning of the term, "commercial establishment," under Proposition 47. As stated in *Abarca*, "'When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word.' [Citation.] Black's Law

Dictionary defines 'establishment' as '[a]n institution or place of business.' (Black's Law Dict. (7th ed. 1999) p. 566, col. 2.) It defines 'commerce' to mean: 'The exchange of goods and services.' (*Id.* at p. 263, col. 1, italics added.) Other sources are in accord. (Merriam-Webster Dict. Online (2016) <Merriam-Webster.com> [as of Aug. 18, 2013] [defining 'commerce' as 'activities that relate to the buying and selling of goods *and services*']; <Business Dict. Online (2016) BusinessDictionary.com> [as of Aug. 18, 2013] [defining 'commerce' as the '[e]xchange of goods or services for money or in kind'].) Thus, we interpret the term 'commercial establishment' as it appears in section 459.5, subdivision (a) to mean a place of business established for the purpose of exchanging goods *or services*." (*Ibid.*, italics added; accord, *In re J.L.* (2015) 242 Cal.App.4th 1108, 1114 (*J.L.*).) In *Abarca*, we held that a bank is a commercial establishment under section 459.5 and Proposition 47. (*Abarca*, at pp. 9-10.)

Likewise, the court in *J.L.* concluded that giving the term, "commercial establishment," its commonsense meaning, "a commercial establishment is one that is primarily engaged in commerce, that is, the buying and selling of goods or services. That commonsense understanding accords with dictionary definitions and other legal sources." We conclude the term "commercial establishment" thus encompasses, not only businesses that buy and sell goods, but also businesses that provide services in exchange for fees. (*J.L.*, *supra*, 242 Cal.App.4th at p. 1114.) A bank therefore is a commercial establishment under Proposition 47 because it is a business that provides services in exchange for fees. The bank where defendant committed the burglary therefore qualifies

under Proposition 47 as a commercial establishment within the ordinary meaning of that term.

The People argue we should take a narrower view of the ordinary meaning of "commercial establishment," limiting it to a place of business established solely for the purpose of buying or selling goods or merchandise. We disagree. Under this narrower definition, a bank would not qualify as a commercial establishments because it offers services, not goods or merchandise. Because Proposition 47 does not provide a clear, unambiguous definition of the term, "commercial establishment," we must construe such language in Proposition 47 "broadly . . . to accomplish its purposes." (Cal. Voter Information Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 74, § 15[3]; see *id.* at p. 74, § 18 [act shall be "liberally construed to effectuate its purposes"].) The stated purposes of the electorate in enacting Proposition 47 include "[r]equir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession." (*Id.* at p. 70, § 3, subds. (3) & (4).) We conclude, as we did in *Abarca* at page 11, "Adopting the limited definition of 'commercial establishment' will frustrate those purposes and result in the continued incarceration of persons who committed petty theft crimes." (*Abarca, supra,* __ Cal.App.5th at p. __ [2016 Cal.App. Lexis 675, at p. 11].) Accordingly, we construe section 459.5, subdivision (a), to include as shoplifting, thefts from commercial businesses that provide services, such as a bank. (*Ibid.*)

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[3] http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf.

V

FORFEITURE OF CONTENTION DEFENDANT

INTENDED TO COMMIT IDENTITY THEFT

Among the crimes reduced to misdemeanors by Proposition 47 are certain second degree burglaries where the defendant enters a commercial establishment with the intent to commit larceny. Such an offense is now characterized as shoplifting as defined in section 459.5, added by Proposition 47. (*Sherow*, *supra*, 239 Cal.App.4th at p. 879.) Section 459.5, subdivision (a), provides in relevant part: "[S]hoplifting is defined as entering a commercial establishment with intent to commit larceny . . . ."

On appeal, the People argue for the first time that defendant's burglary offense is not eligible for reduction to misdemeanor shoplifting because, when defendant entered the bank, he intended to commit identity theft by cashing a forged check. The People reason that, since defendant intended to commit the felony of identity theft when he entered the bank, he committed second degree burglary, a felony, not misdemeanor shoplifting.

Because the People did not raise this argument in the trial court, the People forfeited it on appeal. "[P]oints not raised in the trial court will not be considered on appeal." (*Dimmick*, *supra*, 58 Cal.2d at p. 422; *Gillard*, *supra*, 57 Cal.App.4th at p. 160.) In the People's response to the defendant's felony reduction application, the People did not even check the box stating that defendant was not entitled to the relief requested, or check the box stating his conviction was not a qualifying felony or did not qualify for

some other reason. The People only requested a hearing on the value of the property at issue. But then in the People's opposition brief, the People only argued defendant's offense did not qualify as misdemeanor shoplifting because section 459.5 only applies to commercial establishments (§ 459.5, subd. (a)), and a bank is not a "commercial establishment."

In addition to forfeiting the identity theft contention, it must be rejected because there is no evidence defendant intended to commit identity theft when he entered the bank, and the People did not allege this theory or argue it in the trial court. Forgery was the only crime charged, other than second degree burglary, to which defendant pled guilty. We recognize the People were not required to separately charge the felony of identity theft because burglary is complete upon entry with the requisite criminal intent. (*People v. Brownlee* (1977) 74 Cal.App.3d 921, 930.) Nevertheless, there is nothing in the record supporting the People's contention that defendant entered the bank with the intent to commit identity theft, whereas the People charged defendant with forgery and conceded in their opposition brief in the trial court that defendant entered the bank with intent to commit forgery. No mention is made of identity theft.

The People cite *People v. Barba* (2012) 211 Cal.App.4th 214, 220 (*Barba*) for the proposition that, by merely entering the bank to cash a forged check, defendant committed felony identity theft, rather than shoplifting. But *Barba* is distinguishable and does not support this conclusion. In *Barba*, the court held that the People alleged sufficient facts in the information to support an identity theft charge against the defendant

(§ 530.5, subd. (a)). (*Barba*, at p. 229.) The information alleged that the defendant attempted to cash checks stolen from a company. The checks had the company's personal identifying information on them, including the company's name, address, phone number, checking account number, and routing codes. By cashing the checks, the defendant committed identity theft by using the information on the checks in violation of section 530.5, subdivision (a). (*Barba*, at pp. 228-229.)

In the instant case, unlike in *Barba*, defendant was charged with forgery but not identity theft. As the court in *Barba* notes, forgery and identity theft are different crimes, "although there may be some overlap in the conduct that section 530.5, subdivision (a) and the forgery statute prohibit, the statutes are concerned with remedying two different wrongs." (*Barba*, *supra*, 211 Cal.App.4th at p. 225.) For instance, "Notably, the offense of forgery may be committed by one who possesses either a real or fictitious check. Someone who commits the offense of forgery by using a fake check or similar instrument in which no real person or legal entity is identified would not be guilty of violating section 530.5, subdivision (a). Thus, not every forgery will constitute a violation of section 530.5, subdivision (a)." (*Barba*, at p. 225, italics omitted.)

Although the parties in the instant case do not dispute that defendant entered the bank to cash a forged check or money order, these facts are not sufficient to establish the following elements of identity theft: "(1) that the person willfully obtain personal identifying information belonging to someone else; (2) that the person use that information for any unlawful purpose; and (3) that the person who uses the personal

identifying information do so without the consent of the person whose personal identifying information is being used." (*Barba, supra,* 211 Cal.App.4th at p. 223.) The trial court therefore did not err in reducing defendant's burglary conviction to misdemeanor shoplifting under Proposition 47.

VI

DISPOSITION

The trial court order granting defendant's application for reduction of his second degree burglary conviction to misdemeanor shoplifting under Proposition 47 is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.